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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 348.

Term, 19 .

MARY K. ELLIS,
Petitioner and Appellant Below,

v.

GIRARD TRUST COMPANY, Surviving Trustee Under the Will of GEORGE W. NEVIL, Deceased,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

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INDEX TO PETITION.

	Page
Summary Statement of Matters Involved	1
Jurisdictional Statement	4
Questions Presented	4
Reasons Relied Upon for Allowance of the Writ	5
Prayer for Writ	6

INDEX TO BRIEF.

	Page
Opinions Below	7
Jurisdictional Statement	7
Statement of the Case	7
Argument	11
I. Did the Supreme Court of Pennsylvania by Affirming the Action of the Lower Court Deny Gerge W. Nevil (the Testator) and Mary K. Ellis (the Appellant) Due Process Under the 14th Amendment of the Constitution of the United States by Preventing Proof of the Contract Between Said George W. Nevil and Said Mary K. Ellis (Record Vol. 1, P. 140a) and Thus Deny the Parties a Fair Hearing?	11
II. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Lower Court Illegally Interfere With the Contract Rights of the Parties and Thus Deny the Parties Due Process Under the Said Amendment to the Constitution?	12

INDEX TO BRIEF (Continued).

Page

III. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Said Court Below Deny George W. Nevil and Said Mary K. Ellis Due Process Under the 14th Amendment to the Constitution of the United States by Impairing Contract Obligations Between Said George W. Nevil and Said Mary K. Ellis, and Said George W. Nevil and the Trustee Under His Will for the Benefit of Mary K. Ellis, the Beneficiary? 12

IV. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Court Below Deny the Due Process Guaranteed by the 14th Amendment to the Constitution by Taking Mary K. Ellis' Property (Money and Contract Rights) and Giving the Same to the Trustee or the Charity or the Government Without Just Cause? 13

V. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Lower Court Deny the Testator His Right to Lawfully Dispose of His Property in Any Manner He Wished? 14

VI. Did the Supreme Court of Pennsylvania Deny the Said George W. Nevil His Inalienable Right to Make a Will Disposing of His Property as He Wished? 14

CONCLUSION 18

CASES CITED.

	Page
Avondale v. Sovereign Camp, 134 Net. 717	13
Buchanan v. Worley, 245 U. S. 60	12
Cramer v. McKinney, 355 Pa. 202	13
Edmundson's Estate, 259 Pa. 429	13
Georgia Railway and Elec. Co. v. Decatur, 295 U. S. 165	12
Hartford Ins. Co. v. Delta Pine Land Co., 292 U. S. 143	13
Home Ins. Co. v. Dick, 281 U. S. 397	13
Kocher's Estate, 354 Pa. 81	13
McGinley's Estate, 257 Pa. 478	13
Morehead v. N. Y., 298 U. S. 587	12
Saunders v. Shaw, 244 U. S. 317	12
Terrence v. Thompson, 263 U. S. 197	12
Van Beil v. Brogan, 65 Pa. Supr. Court 384	16
Van Meter v. Morris, 318 Pa. 137	13
Williamson's Estate, 61 Montgomery L. R. 242	16, 17

STATUTES AND AUTHORITIES CITED.

	Page
Constitution of the United States, 14th Amendment	5, 12, 16, 18
Judicial Code of June 25, 1948, Chapter 646, 62 Sta. 929, 28 U. S. C. A. 1257	4, 7

IN THE

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GIRARD TRUST COMPANY, SURVIVING TRUSTEE UNDER THE WILL OF GEORGE W. NEVIL, DECEASED,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

To the Honorable Fred M. Vinson, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Mary K. Ellis, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, and respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED.

George W. Nevil, the testator, died October 29, 1930, a resident of Delaware County, Pennsylvania, leaving a will (a copy of which is in the record Vol. 1 P. 5a) by which will, after various devises and bequests he gave his residuary estate to Dimner Beeber (who predeceased him) and Girard Trust Company (now Girard Trust Corn Exchange Bank), in trust to invest and keep invested, and after deducting the proper charges against the trust estate and a reasonable compensation for their services, to pay out of

the net income thereof as follows:—"(1) To Mary A. Kelly" (now Mary K. Ellis, the petitioner and appellant) "the sum of Seven Thousand Dollars monthly so long as she shall live, free and clear of any and all her debts, contracts or engagements, and *after her death* the principal of the said estate, upon which she has been receiving the said monthly sum, shall become part of my residuary estate; (2) To establish and maintain an asylum for the deaf, dumb and blind to be known as the "Nevil Asylum for the Deaf, Dumb and Blind" the said net income to be allowed to accumulate until it reaches a sum sufficient, in the judgment of the Executors and Trustees, to establish and maintain such asylum and the support of the same thereafter to be paid out of the income."

He further provided:

> "All the bequests, legacies and devises herein contained are to be free from *any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, which taxes are to be paid by my estate.*"

Mary A. Kelly, the beneficiary aforesaid, survived him, and is the Mary K. Ellis, the appellant. She had been raised by the decedent, his sister, and his five brothers in their household since she was a very small girl, and is now over forty years of age. Testator's brothers and sister all preceded him in death. None of them had ever married or had any children. They all resided together. This testator also died single. He always referred to Mary K. Ellis as his ward and she called him Uncle George. He, Mary K. Ellis and the servants constituted his household. He had set up a style of living and desired that style after his death to be continued by Mrs. Ellis. He calculated the cost thereof and by his will endeavored to provide that she should have sufficient to carry out his wishes. He was a man in his eighties, had been through many tax situations

and their many changes between 1913 and 1931, and hence knew the effect the tax situation might have on the seven thousand dollars a month he calculated his ward must have to live as they had lived and as he wished. He had purchased the two large establishments in which they resided—one in Haverford and one in Ventnor—and given them to her. He kept two large cars, and wished her, and made her promise, after his death to do likewise. She agreed with him she would do so.

The admission of a large part of the appellant's evidence was denied by the trial judge. In affirming the action of the trial judge the Supreme Court of Pennsylvania affirmed this.

Practically Testator's entire estate was invested in municipals, upon the income from which there was no income tax.

After arranging things as he thought he had, he made his will as aforesaid.

The Trustee after his death disposed of a large part of the municipals gradually and reinvested the moneys in taxables. This increased the Estate's income so that after the seven thousand dollars a month was paid to Mrs. Ellis almost $1,000,000 has now accumulated and is held by the Trustee undistributed.

However, as to Mrs. Ellis, the chief object of testator's bounty, the result was a large part of her seven thousand dollars a month has been and is being consumed by income taxes; (see Vol. 1 of the Record P. 77a for figures). She was unable, because thereof, to maintain the homes and do that which he wished her to do and which she had agreed with him to do. She, therefore made a demand upon the Trustee that it pay the income tax on the seven thousand dollars a month under the above provision of the will. The Trial Court first agreed with her and so found. The Trustee thereafter felt the Home should be specially represented by separate counsel, the adjudication was opened and a reaudit held. The trial Court by its second adjudication held

the Trustee was not obliged to pay the tax, and denied her petition. An appeal from this decree was taken to the Supreme Court, which filed two opinions—the majority opinion sustaining the Court below—two of the Justices however dissenting and filing also an opinion. A rehearing was denied. This appeal was thereupon taken.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Chapter 646 of the Judicial Code of June 25, 1948, 62 Sta. 929, 28 U. S. C. A. 1257.

The petition for rehearing was dismissed and the rehearing denied July 20, 1951.

QUESTIONS PRESENTED.

1. Did the Supreme Court of Pennsylvania by affirming the action of the lower Court deny George W. Nevil (the testator) and Mary K. Ellis (the appellant) due process under the 14th Amendment to the Constitution of the United States by preventing proof of the contract between said George W. Nevil and said Mary K. Ellis (Record Vol. 1, P. 140a) and thus denying the parties a fair hearing?

2. Did the Supreme Court of Pennsylvania by affirming the decree of the lower Court illegally interfere with the contract rights of the parties and thus deny the parties due process under the said Amendment to the Constitution?

3. Did the Supreme Court of Pennsylvania by affirming the decree of the said Court below deny George W. Nevil and said Mary K. Ellis due process under the 14th Amendment to the Constitution of the United States and by impairing contract obligations between said George W. Nevil and said Mary K. Ellis, and said George W. Nevil and the Trustee under his will for the benefit of Mary K. Ellis, the beneficiary?

4. Did the Supreme Court of Pennsylvania by affirming the decree of the Court below deny the due process guar-

anteed by the 14th Amendment to the Constitution by taking Mary K. Ellis' property (money and contract rights) and giving the same to the Trustee or the Charity or the Government without just cause?

5. Did the Supreme Court of Pennsylvania by affirming the decree of the lower Court deny the testator his right to lawfully dispose of his property in any manner he wished?

6. Did the Supreme Court of Pennsylvania deny the said George W. Nevil his inalienable right to make a will disposing of his property as he wished?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Pennsylvania has decided important questions contrary to the Fourteenth Amendment to the Constitution of the United States, and the decisions of this Court.

2. The Supreme Court of Pennsylvania in affirming the decree of the lower Court has denied the defendant due process of law contrary to the 14th Amendment to the Constitution of the United States by the exclusion of the testimony of an important witness (Record Vol. 1, Pp. 140a, 141a).

3. The Supreme Court of Pennsylvania by preventing proof of the contract between decedent and appellant denied the appellant a fair hearing guaranteed by the Constitution.

4. The Supreme Court of Pennsylvania by affirming the decision of the trial Court denied appellant the due process guaranteed by the Fourteenth Amendment to the Constitution of the United States inasmuch as it impairs contract obligations between decedent and beneficiary and between decedent and trustee for the benefit of beneficiary.

5. The decision of the Supreme Court of Pennsylvania denies the appellant due process under the Fourteenth

Amendment to the Constitution of the United States because it takes the beneficiary's property (being money and contract rights), and gives it to the trustee or the charity without just compensation.

6. The decision of the Supreme Court of Pennsylvania denies the testator the right to legally dispose by will of his property—which is contrary to the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR WRIT.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Pennsylvania, commanding said Court to certify and send to this Court for its full review a full and complete transcript of the record and the proceedings of the said Supreme Court of Pennsylvania in the case at bar, and entitled on its docket as "No. 29—Estate of George W. Nevil, Deceased,—Appeal of Mary K. Ellis—Appeal from the definitive Decree of the Orphans' Court of Delaware County as of July Term, 1931, No. 22," to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of the said Supreme Court of Pennsylvania may be reviewed by this Court, and for such further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The original opinions of the Supreme Court of Pennsylvania, both majority and minority, are reported in 367 Pa. Page 30.

The subsequent orders are not reported but are set forth in the Record on Pages 597 et seq.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Chapter 646 of the Judicial Code of June 25, 1948, 62 Sta. 929, 28 U. S. C. A. 1257.

The petition for rehearing was dismissed and the rehearing denied July 20, 1951.

STATEMENT OF THE CASE.

George W. Nevil died on October 29, 1930, at the age of 83, a resident of Delaware County, Pennsylvania, leaving a will, by which will he, after various devises and bequests, provided (P. 5a Vol. 1 of record).

> "FOURTH: I give and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and nature, and wheresoever situated, to my Executors and Trustees hereinafter named, In Trust Nevertheless, to invest the same and keep the same invested, and after deducting the proper charges against the said trust estate and a reasonable compensation for their services, to pay out of the net income thereof as follows:—(1) To Mary A. Kelly the sum of Seven Thousand Dollars monthly so long as she shall live, free and clear of any and all her debts, contracts or engagements, and after her death the principal of the said estate, upon which she has been receiving the said monthly sum, shall become a part of my residuary estate. (2) To establish and maintain an Asylum for

the deaf, dumb and blind to be known as the 'Nevil Asylum for the Deaf, Dumb and Blind' the said net income to be allowed to accumulate until (it) reaches a sum sufficient, in the judgment of the Executors and Trustees, to establish and maintain such asylum and the support of the same thereafter to be paid out of the income."

"All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, which taxes are to be paid by my estate."

He was the last to die of five brothers and one sister, all of whom had resided together, and as each one died his or her property had passed to those still living. The estate exceeded $4,800,000. None of them had ever married or had issue. Mary K. Ellis was brought into the household when a little girl by her aunt who managed the household of the Nevil family. The child lived in the household thereafter and was supported by them and reared for over thirty-five years as though she was their natural child. They referred to her as their ward and were devoted to her. She called them "Uncle" and "Aunt", and was devoted to them. The decedent had bought for her two large estates—one in Haverford, Pennsylvania, and one in Ventnor, New Jersey. There they resided. He had numerous servants who had been with the family many years. He kept several automobiles.

Evidence was offered in the Court below that he had arranged his affairs so that she could do as he wished, to wit: to maintain this scale of living and go on living as they did prior to his death, maintaining the properties, retaining the help, etc., and that she had agreed with him so to do. Evidence was offered to show that he figured it would cost about seven thousand dollars a month to so do

(Record Vol. 1, Pp. 117a and 121a) and he therefore so provided in his will. Evidence was also offered in the lower Court that he did not know what to do with his estate after Mrs. Ellis' death, as he had no near relatives, and the Home idea was a sudden one suggested by his attorney because both he, the said attorney, and the testator were gradually becoming deaf. Evidence was offered that he had then said he was not interested after Mrs. Ellis' death, as she was all he had. A large part of his testimony so offered was rejected by the trial Judge.

Testimony was offered that the testator had paid no income tax prior to his death because he had practically all of his estate invested in exempt municipals, and that in calculating the amount he wished Mrs. Ellis to have he expected it to be likewise free of any such tax. To make sure that the seven thousand dollars a month was not reduced by any taxes he used the broadest language possible, to wit:—

> "All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, which taxes are to be paid by my estate."

And a further careful reading of the will shows that to accomplish this he directed that the fund left to create the seven thousand dollars a month for Mrs. Ellis was not to fall into the residuary until her death. Approximately $1,000,000 income has accumulated and should have been and should be used to carry out his wish—pay her the seven thousand dollars a month and pay any and all taxes imposed or to be imposed. She was the chief object of his bounty. He did not expect his plan to be wrecked as to her and this large fund be accumulated for a charity which he named because he could think of nothing else.

The will was prepared by the Honorable Dimner Beeber, his counsel for years and a very able attorney, who himself had been a member of the Superior Court of Pennsylvania. In the record (Rec. 1-158a) is a statement of the increase in her income tax from the time of his death, caused almost entirely by the shift of the securities comprising the trust from the non-taxables to the taxables. This caused Mrs. Ellis to be deprived of her property without her consent. This change has caused approximately $1,000,000 income to accumulate in the hands of the trustee and thus enure to the advantage of the Home to be formed in the future, in which the testator had only a passing interest. This he did not intend. Mary K. Ellis was the *first* object of his bounty and it was only after his careful provisions for her were carried out and her death that he wished the Home to come in. That is why he directed the fund from which her $7,000 a month was to be derived was to be held intact until her death and that the Home should then get any income. He expected his plans for her and agreement with her to be first carried out and whatever remained would on her death go to the Home. It was also contrary to the agreement between the testator and Mrs. Ellis and contrary to the implied agreement between the testator and the trustee whom testator expected to carry out his wishes so clearly stated—that the seven thousand dollars a month was to be *free and clear of all taxes, imposed or to be imposed by the United States.*

To construe the will other than appellant contends denies the testator his right to make a will, and further his right to dispose of his property as he wished—which rights are guaranteed by the Constitution.

ARGUMENT.

I. Did the Supreme Court of Pennsylvania by Affirming the Action of the Lower Court Deny George W. Nevil (the Testator) and Mary K. Ellis (the Appellant) Due Process Under the 14th Amendment of the Constitution of the United States by Preventing Proof of the Contract Between Said George W. Nevil and Said Mary K. Ellis (Record Vol. 1, P. 140a) and Thus Deny the Parties a Fair Hearing?

The testimony offered clearly shows there was an agreement between the testator and Mrs. Ellis as to the amount it would require to carry out his wishes, and that he would provide that amount by his will; and that in order to do so he provided there should be no diminution of it by any kind of taxes. He made the tax clause as broad as any man could do—not naming *any* specific kind of taxes, because by doing so he knew it might limit rather than enlarge the taxes he had in mind. He knew there were income taxes and he knew that they reduced materially one's income. He knew taxes were subject to change and had been changed from time to time. He further knew there had been an excess profits tax. How, therefore, could he otherwise express his wishes than by saying "*any and all taxes*" and "imposed and to be imposed"? That he had in mind more than estate and inheritance taxes is further clearly shown by his use of the words "any municipality", as estate and inheritance taxes are only levied by the United States or a State. He meant exactly what he said "any and all".

There being doubt in the mind of the auditing judge as to the intent of testator as expressed in his will appellant felt it necessary to offer evidence of the facts leading to and surrounding the making of the will. Such was done, but the auditing judge refused the admission of much of

it. Its action was erroneously affirmed by the Supreme Court of Pennsylvania.

This constituted a denial of due process guaranteed to the appellant by the Fourteenth Amendment to the Constitution because it prevented the proof of a contract by the testator and appellant and that the provisions of the will were pursuant to that contract, which action amounts to the denial of a fair hearing. In *Saunders v. Shaw,* 244 U. S. 317; and *Georgia Railway and Elec. Co. v. Decatur,* 295 U. S. 165-171, your Honorable Court held the refusal of a State Court to admit evidence may deny due process guaranteed by the Fourteenth Amendment.

II. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Lower Court Illegally Interfere With the Contract Rights of the Parties and Thus Deny the Parties Due Process Under the Said Amendment to the Constitution?

III. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Said Court Below Deny George W. Nevil and Said Mary K. Ellis Due Process Under the 14th Amendment to the Constitution of the United States by Impairing Contract Obligations Between Said George W. Nevil and Said Mary K. Ellis, and Said George W. Nevil and the Trustee Under His Will for the Benefit of Mary K. Ellis, the Beneficiary?

Your Honorable Court held in *Morehead v. N. Y.,* 298 U. S. 587, 610; *Buchanan v. Worley,* 245 U. S. 60, 70; and *Terrence v. Thompson,* 263 U. S. 197, 215, that among the property rights protected by the 14th Amendment was the right to contract and to so dispose of his property. The action of the Supreme Court of Pennsylvania and the lower Court denied the right of the parties to contract and therefore constituted a denial of due process, and should be set aside.

See also *Avondale v. Sovereign Camp,* 134 Net. 717, and cases therein cited particularly *Home Ins. Co. v. Dick,* 281 U. S. 397, *Hartford Ins. Co. v. Delta Pine Land Co.,* 292 U. S. 143.

The Pennsylvania Courts have continually held that a contractual relationship can exist between a testator and a beneficiary who rendered services in consideration of being named a beneficiary under the will, and between a testator:

McGinley's Estate, 257 Pa. 478;
Edmundson's Estate, 259 Pa. 429;
Van Meter v. Morris, 318 Pa. 137;
Kocher's Estate, 354 Pa. 81;
Cramer v. McKinney, 355 Pa. 202.

IV. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Court Below Deny the Due Process Guaranteed by the 14th Amendment to the Constitution by Taking Mary K. Ellis' Property (Money and Contract Rights) and Giving the Same to the Trustee or the Charity or the Government Without Just Cause?

The will clearly shows that the testator wished the seven thousand dollars a month to be "free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof, and such taxes were to be paid by my estate."

If testator had meant merely estate or inheritance taxes, he would have said so. He went further; he said "taxes lawfully imposed or to be imposed by the United States Government or any State Government *or any municipal* authority thereof." He well knew only the United States and the States could impose estate and inheritance taxes and that a municipal authority could not impose that kind of a tax. He was an intelligent man who had a large fortune and knew the effect of taxes. We must concede that he meant what he said. By not paying the tax, it reduced the seven thousand dollars a month to her and increased

the amount for the Home—which he did not wish and would not have had.

V. Did the Supreme Court of Pennsylvania by Affirming the Decree of the Lower Court Deny the Testator His Right to Lawfully Dispose of His Property in Any Manner He Wished?

VI. Did the Supreme Court of Pennsylvania Deny the Said George W. Nevil His Inalienable Right to Make a Will Disposing of His Property as He Wished?

Testator wished to make sure the beneficiary would net seven thousand dollars a month for herself. He therefore said "any and all taxes" and "imposed and to be imposed." The Court below, however, has read into his will something that is not there and something he did not intend. The testator said "any and all taxes lawfully imposed or to be imposed." The Court below in its majority opinion practically says that phraseology merely means "imposed at date of decedent's death." Testator did not say that. He said "lawfully imposed or to be imposed." He was a man of sound mind and knew what he was doing. He was creating a trust that he well knew would probably run for years after his death and that old taxes were changed and new ones imposed. To make sure that all taxes in force at his death or thereafter imposed were intended he says as aforesaid "any and all taxes lawfully imposed or to be imposed". That is what he meant and any construction otherwise violated his right to make a will and dispose of his estate as he wished, and constituted a violation of the 14th Amendment. There was no dispute as to the testator's competency, nor was his wish illegal. He was an educated man of large affairs. He well knew that ordinarily in the absence of express words to the contrary only the inheritance or estate tax laws in effect at his death would affect his estate. That is why he said "any and all taxes imposed or to be imposed". He wishes to cover all taxes imposed then or thereafter, during the life of the trust.

He further knew income tax laws could and would be changed from time to time and they might affect the annual payments to Mrs. Ellis. For that reason he used the phraseology he did.

What more could he do? What more could he say?

He directed the fund from which her $7,000 a month was to be derived (which was the entire residuary estate) to be held intact *until her death* and then to create the fund for the Home. We must concede that he had a reason for this, and that the reason was to make sure of Mrs. Ellis' having $7,000 a month free and clear of any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof and that all such taxes were to be paid by the estate.

The Supreme Court of Pennsylvania in its majority opinion held he was only referring to estate or inheritance taxes.

His use of the words "any and all taxes" clearly shows he did not. He meant just what he said.

Furthermore, that the testator had in mind other than estate and inheritance taxes is evidenced by his use of "any municipal authority". **No municipal authority ever imposed an estate or inheritance tax. It cannot in Pennsylvania. Therefore he must have had other taxes in mind.** This shows beyond any doubt that the testator must have been thinking about other taxes. He knew that a municipal authority might impose a tax of some kind—not necessarily estate or inheritance tax—that would affect the net amount the beneficiary would have of the $7,000 a month. **To avoid any such question and make his provision all-inclusive he said, as heretofore stated, "Any and all taxes lawfully imposed or to be imposed by the United States Government or any municipal authority thereof," ~~he used the phraseology he did.~~ How else could he say it?**

To do anything in any way that would limit the meaning of the words the testator used would amount to a read-

ing in the will of something testator did not intend, and as heretofore stated deprive him of his right to dispose of his property as he wished and the beneficiary of her right to the full $7,000 a month. To do so violated the 14th Amendment to the Constitution.

The Supreme Court of Pennsylvania referred to the difficulty calculating the tax as a reason for its majority opinion.

Does the fact that the result of the appellant's contention would cause difficult accounting justify the Supreme Court of Pennsylvania in denying the testator his right to dispose of his property as he wished?

The answer is no; the testator had the right to dispose of his property as he wished. The burden of calculation would fall on the trustee, who accepted the trust and was and would be compensated therefor.

The calculation would not be impossible. All one had to do was ascertain the income tax imposed on her whole income ~~allowance to~~ this $84,000 a year and pay the sum so imposed in the first instance (as Judge Halloran said in *Williamson's Estate,* hereafter cited). This would satisfy the appellant, and the will of the testator would be carried out.

As heretofore stated the testator said he wished Mrs. Ellis to have the $7,000 a month and any and all taxes that would affect it were to be paid out of the estate. It might be difficult of computation. It is not impossible. To be difficult is no excuse. The estate provided the trustee was to have "reasonable compensation" and they should therefore not complain.

Judge Ladner in his dissenting opinion cites *Van Beil v. Brogan,* 65 Pa. Supr. Court 384 in support of his finding that the lower Court erred and should be reversed.

There is also the case of *Williamson's Estate,* 61 Montgomery L. R. 242, where the testator gave his wife the annual sum of eight thousand dollars during the period of her natural life, or until she remarries, "* * * I direct

that the said income of eight thousand dollars shall be payable to the said Ella A. Brown Williamson net and free from all liability for taxes, or charges of any character, which said taxes or other charges, if any, shall be payable out of my residuary estate." There the Court said:

> *"We can only consider the exact meaning of the words used and they are so all-inclusive as to make it impossible to come to any conclusion but that any possible tax that would be a charge or encumbrance on the income is payable out of the residuary estate of the decedent. The testator employs every possible word available in the language and with the choice of the strongest to indicate his intentions.* • • • *Furthermore, when we consider that this annuity constitutes income and that the primary and essential tax on income is an income tax,* it seems convincing that he intended tax on this sum to be paid out of the residue and we so hold. The practical manner to make the calculation of the amount due the annuitant is to ascertain each year the amount of income tax imposed on her whole income that is allocable to this $8,000, and pay that sum so imposed *in the first instance and that sum alone, in addition to the total of $8,000."*

This case is in point, and certainly answers the reasoning of the Supreme Court of Pennsylvania and in every point.

In the case at bar the testator clearly states his wish. The Supreme Court of Pennsylvania has denied him his right so to do. Your Honorable Court should reverse it and direct the wish of the testator to be carried out—which can easily be done, as set forth in *Williamson's Estate* aforesaid.

This case has attracted widespread interest. Tax Magazines, Law Reviews, Booklets issued by trust companies on making wills and even newspapers have given the same write-ups. **It is important therefore that the questions submitted be decided.**

CONCLUSION.

For the foregoing reasons the appellant claims

(1) That the testator by using the comprehensive language that he did intended exactly what he said, to wit; the beneficiary should have the $7,000 a month free from *any and all taxes* lawfully imposed or to be imposed by the United States Government or any state Government or any municipal authority thereof, which taxes were to be paid by his estate.

(2) That the Supreme Court of Pennsylvania has by its action in this case deprived her of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

(3) That the testator was also deprived by the Supreme Court of Pennsylvania of due process of law guaranteed by the 14th Amendment to the Constitution.

(4) That the Supreme Court of Pennsylvania has read into the testator's will something that does not appear therein.

(5) The Supreme Court of Pennsylvania by its decision has deprived a testator from disposing of his property as he wished and making a will as he wished.

(6) The action of the Supreme Court should be set aside and a decree entered holding that the Trustee must reimburse appellant for the income taxes to date caused by the $7,000 a month legacy and hereafter pay the income and any other taxes caused thereby, imposed or to be imposed by the United States, any state or municipality thereof.

Respectfully submitted,

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Counsel for Petitioner.

WILLIAMSON'S ESTATE.

(Orphans' Court of Montgomery Co., Pa.)

(Reported 61 Mont. (Pa.) 242.)

Wills—Construction—Taxes—Direction to pay from residue—Federal estate tax on property not passing through estate—Income tax on annuity.—

1. Testator directed that "all estate, inheritance and/or succession taxes payable by the Executors of this my Will, or may be assessed upon or chargeable upon any annuity, legacy, absolute, for life or a lesser period, shall be paid out of my residuary estate, . . ." The widow received certain insurance payable directly to her. Held: that the federal estate and Pennsylvania additional estate tax proportioned to the amount of the insurance so received were payable out of the residuary estate.

2. Testator made the criterion of the tax to be paid out of the residue depend upon whether the tax was "payable by the executors".

3. Testator gave his wife an annuity "net and free from all liability for taxes, or charges of any character, which said taxes or charges if any, shall be payable out of my residuary estate." Held: that the income tax assessed against the annuity shall be paid out of the residue.

O. C. MONTGOMERY COUNTY. No. 49,108. First and final account of WILLIAM C. WILLIAMSON and Girard Trust Company, executors: Estate of John D. Williamson, Jr., deceased.

Samuel H. High, Jr., of High, Swartz, Flynn & Roberts, and Thomas M. Hyndman, for accountants.

James Herbert Egan and Carlyle H. Ross, for Ella A. Brown Williamson, widow and annuitant.

HOLLAND, P. J., May 11, 1945:—The record facts, the terms of the will, the identity of the interested parties and the proportions of their respective interests are all shown in the petition for adjudication. All interested parties survived the testator, are living, of age, and sui juris.

The supplemental account presented at the audit shows a combined balance of principal and income personalty in the sum of $357,214.82, composed as shown on the second to fourth inclusive pages of the said supplemental account.

All transfer inheritance tax due the Commonwealth has been paid.

In the inventory there is an item in the sum of $1789.67, indicated as a receipt from Fidelity-Philadelphia Trust Company, trustee under the will of George W. Williamson, deceased, due decedent's estate under an assignment of William C. Williamson, 3rd. By letter hereto attached, Girard Trust Company indicates that this item should be described as coming to the estate under an assignment of George W. Williamson, 3rd. The same item appears in the account on page 14, and in the supplemental account on page 4. The record is accordingly corrected to the effect that this assignment is by George W. Williamson, 3rd, instead of by William C. Williamson, 3rd.

In paragraph 11 (a) of the petition for adjudication is indicated various sums which have been paid to

decedent's widow, son, daughter, and grandchildren specifically named therein, from insurance payable directly to them. The query is submitted as to whether these insurance beneficiaries are liable for the payment of the federal estate tax and Pennsylvania additional estate tax proportioned to the amounts received by them, or whether all of these taxes are payable out of the residuary estate under the twelfth clause of the will, which reads as follows: "TWELFTH. I direct that all estate, inheritance and/or succession taxes payable by the Executors of this my Will, or may be assessed upon or chargeable upon any annuity, legacy, absolute, for life or a lesser period, shall be paid out of my residuary estate, and I authorize my Executors, if they deem best, to pay all such taxes prior to or at the time of the settlement of their account so that the ultimate remainders may be free of such taxes upon vesting in possession."

The language used in this clause of the will is so all-inclusive that we cannot escape the conclusion that he intended these taxes to be paid out of the residue. They come within the description of "estate, inheritance, and/or succession taxes," and are "payable by the executors of this my will." There might be some doubt if he had referred to the taxes payable only on annuities or legacies or some such other item that could be only in a will, but he makes the criterion of the tax to be paid out of the residue as to whether it is "payable by the executor". Obviously all these estate taxes are charged in the first instance against the executor or executors and they have to pay them. We see no other conclusion, therefore, than that the taxes which the executors have to pay on the insurance are to be paid out of the residue, and we so hold.

The question is submitted as to whether under clause Fifth A (1), income tax assessed against the

annuity in favor of the widow therein provided is to be payable out of the estate.

The item of the will is as follows: "FIFTH. A. (1) To pay to my wife, Ella A. Brown Williamson, if she should survive me, the annual sum of Eight Thousand Dollars ($8,000.00) during the period of her natural life, or until she remarries, payable in quarterly payments of Two Thousand Dollars ($2,000.00) each, in lieu of all dower and other interest, right and title whatsoever, in exact accordance with a Pre-Nuptial Agreement entered into and executed by the said Ella A. Brown with me, the said John D. Williamson, Jr., under date of the Twenty-third day of January, 1929; I direct that the said income of Eight Thousand Dollars ($8,000.00) shall be payable to the said Ella A. Brown Williamson net and free from all liability for taxes, or charges of any character, which said taxes or other charges, if any, shall be payable out of my residuary estate."

The language of the pre-nuptial agreement referred to in this item purporting to exempt the income from any taxes or charges is precisely the same as the language contained in the item of the will.

Here again, we can only consider the exact meaning of the words used and they are so all-inclusive as to make it impossible to come to any conclusion but that any possible tax that would be a charge or encumbrance upon the income is payable out of the residuary estate of the decedent. The testator employs every possible word available in the language and with the choice of the strongest to indicate this is his intention. He directs that the $8,000 per year shall be payable to his wife "net and free", from "all liability for taxes, or charges of any character." Certainly the

income tax on the $8,000 is a tax "of any character," or we might say it is a tax that has a particular character of its own and comes within the general category. Furthermore, when we consider that this annuity constitutes income and that the primary and essential tax on income is an income tax, it seems convincing that he intended tax on this sum to be paid out of the residue, and we so hold. The practical manner to make the calculation of the amount due the annuitant is to ascertain each year the amount of income tax imposed on her whole income that is allocable to this $8,000, and pay that sum so imposed in the first instance and that sum alone, in addition to the total of $8,000.

Subject to the disposition of the questions submitted, the net ascertained balances of principal and income are awarded as suggested in the last paragraph of the petition for adjudication.

All awards are subject to distribution heretofore properly made.

The account and supplemental account are approved, and it is ordered and decreed that Girard Trust Company and William C. Williamson, executors as aforesaid, forthwith pay the distributions herein awarded.

Counsel for accountants shall file a schedule of distribution in duplicate.

And Now, May 11, 1945, this adjudication is confirmed nisi.

TABLE OF CONTENTS

PAGE

BRIEF FOR RESPONDENT IN OPPOSITION:

Opinions Below 1

Jurisdiction 2

Questions Presented 5

Statute and Regulations Involved 6

Argument:

I. The Petition for a Writ of Certiorari is out of time 7

II. There was no federal question presented to the Supreme Court of Pennsylvania 7

III. The construction of a Will by state courts is binding upon federal courts 10

IV. There has been no denial of due process to the petitioner 12

Conclusion 14

TABLE OF CITATIONS

CASES:

American Surety Co. vs. Baldwin, 287 U. S. 156 9

Bailey vs. Anderson, 326 U. S. 203 9

Citizens' Bank vs. Opperman, 249 U. S. 448 ..... 3, 8

Conner's Estate, 346 Pa. 271, 29 A. 2nd 514 11

Consolidated Turnpike Co. vs. Norfolk & O.V.R. Co., 228 U. S. 326 9
Forbes vs. State Council, 216 U. S. 396 9
Herndon vs. State of Georgia, 295 U. S. 441 9
Jacob's Estate, 343 Pa. 387, 22 A. 2nd 744 11
Lyeth vs. Hoey, 305 U. S. 188 12
McCorquodale vs. Texas, 211 U. S. 432 9
Radio Station WOW vs. Johnson, 362 U. S. 120 ..... 4, 9
Reinheimer's Estate, 265 Pa. 185, 108 A. 412 11
Shareff's Estate, 143 Pa. Super. 465, 17 A. 2nd 623 ... 11
Sharpe vs. Commissioner of Internal Revenue, 107 F. 2nd 13, certiorari denied 309 U. S. 665 ..... 4, 12
Simmerman vs. Nebraska, 116 U. S. 54 9
U. S. ex rel. Herge vs. Commonwealth of Pennsylvania, 89 F. Supp. 636 10

RULES:

Pennsylvania Supreme Court Rule No. 69 ..... 2, 7
Supreme Court Rule 38 3

STATUTE:

U. S. C. Title 28, Sec. 2101 (c) 3, 8

IN THE SUPREME COURT OF THE UNITED STATES

Number 348

October Term, 1951

Mary K. Ellis, Petitioner

vs.

Girard Trust Company, Surviving Trustee Under the Will of George W. Nevil,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 367 Pa. 30. The subsequent petitions and orders are not reported but are set forth in the Record on pages 597 et seq.

JURISDICTION

The above entitled cause was argued and submitted to the Supreme Court of Pennsylvania on January 3, 1951 and an opinion rendered and judgment entered on March 27, 1951, by the Supreme Court of Pennsylvania.

Pennsylvania Supreme Court Rule No. 69 states:

> "Rule 69. Petitions for reargument must be made before the record is returned to the court below, unless this court, upon cause shown, shall extend the time; and must specify particularly the point supposed to have been overlooked or misapprehended by the court (with a proper reference to the portions of the original Brief or Record relied on to establish the fact alleged) the reasons for a rehearing, and arguments in favor thereof. Attached thereto shall be a copy of all the opinions filed in the case; and, accompanying it, a copy of all the Briefs used in the argument of the case."

The docket entries (Record page 597) disclose that Petitioner complied with this rule by filing a petition for reargument on April 5, 1951. This petition was denied on April 16, 1951 and the record remitted to the court below on April 17, 1951. The Supreme Court of Pennsylvania did not grant the petitioner an extension of time for filing a second petition for reargument. Final judgment was therefore entered by the

Supreme Court of Pennsylvania on April 16, 1951. See: *Citizens' Bank vs. Opperman,* 249 U.S. 448.

Thereafter, on June 22, 1951, Petitioner filed a Petition for Leave to File a Second Petition for Reargument. This Petition was denied July 20, 1951. By this subterfuge, Petitioner now claims final judgment was not entered until this latter date.

The petition for a writ of certiorari was filed by petitioner on September 22, 1951, more than three months since the entry of judgment by the Supreme Court of Pennsylvania, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C. Title 28, Sec. 2101 (c) and Rule 38 of this Court).

Therefore, it appears that petitioner's application for a writ of certiorari is out of time and should be denied.

It is well settled that this Court will not review a decision of a State Court unless it affirmatively appears from the record that a federal question was presented to the highest court of the State having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. The record clearly discloses that no federal question was raised in the instant cause until petitioner filed the Petition for Leave to File a Second Petition for Reargument on June 22, 1951, more than two months after the Pennsylvania Supreme Court's decision had become final. The federal question therefore appears for the first time *after* the petition for reargument had been dismissed. This Court has held that raising the federal

question for the first time in a petition for reargument itself is insufficient unless the Court actually entertains the petition and expressly decides the question. See: *Radio Station WOW vs. Johnson,* 362 U.S. 120, 128. The Supreme Court of Pennsylvania did not entertain the petition for reargument or the petition for leave to file a second petition for reargument.

Therefore, it appears that petitioner never presented a federal question to the Supreme Court of Pennsylvania and this court therefore has no jurisdiction of the cause.

Further, there is no federal question involved in the determination of the instant cause because this Court has repeatedly held that the judicial construction of a Will by a State Court determines not only legally but practically the extent and character of the interests taken by the legatees and is binding on the federal courts. See: *Sharpe vs. Commissioner of Internal Revenue,* 107 F. 2nd 13, 14, certiorari denied 309 U.S. 665.

For the foregoing reasons, respondent respectfully submits that this Court does not have jurisdiction of the instant cause.

QUESTIONS PRESENTED

The questions presently before this Court are:

1. Is a Petition for a Writ of Certiorari in time when filed more than three months after the decision below became final?

2. Has Petitioner properly raised the federal question by inserting it in a pleading entitled "Petition for Leave to File a Second Petition for Reargument"?

3. Will this Court review a decision of a State Court construing a Will?

4. Did the Supreme Court of Pennsylvania, by affirming the action of the lower court, deny the Petitioner due Process under the 14th Amendment of the Constitution of the United States by preventing proof of the alleged contract between the decedent and the petitioner and thus deny the parties a fair hearing?

Respondent respectfully represents that the answer to each of the foregoing questions is in the negative.

[redacted]

STATUTE AND REGULATIONS INVOLVED

There are no federal Statutes or Regulations involved in the instant cause. The only questions presented to the Supreme Court of Pennsylvania involved the construction of a Will and the extent and character of the interest taken by the Petitioner under the terms of the said Will.

ARGUMENT

The issue presently before this Court is whether this Court will review the decision of a State Court construing a Will when no federal question is involved and when the petition for a Writ of Certiorari is out of time.

I. The Petition for a Writ of Certiorari Is Out of Time

and

II. There Was no Federal Question Presented to the Supreme Court of Pennsylvania

The Supreme Court of Pennsylvania rendered an opinion and entered judgment thereon on March 27, 1951. Under the rules of that Court, any petition for reargument must be made before the record is returned to the Court below, unless the Court, upon cause shown, extends the time (Pennsylvania Supreme Court Rule No. 69, supra). Petitioner herein did file a Petition for reargument prior to the time the record was returned to the Court below. No federal question was presented to the Pennsylvania Supreme Court at that time nor had any federal question been raised previously. This petition for reargument was denied on April 16, 1951, and thereupon, the decision of that Court became final. This Court has held that the judgment

of a State Court becomes final for purposes of review in the federal Supreme Court by writ of error or certiorari, in a case in which a petition for rehearing is entertained, upon the date of the denial or other disposition of such petition. See: *Citizens' Bank vs. Opperman,* supra.

Thereafter, the petitioner had a period of ninety days within which time she could petition for a writ of certiorari or show cause to a Justice of this Court why she should be granted an extension. See: U.S.C. Title 28, Sec. 2101 (c). She did neither. Instead, on June 22, 1951, Petitioner filed a pleading entitled "Petition for Leave to File a Second Petition for Reargument". This pleading was clearly out of order and is now claimed by Petitioner as one which tolled the running of the ninety-day period. It was denied without comment by the Supreme Court of Pennsylvania on July 20, 1951, several days after the ninety-day period had expired. It is to be noted that it was not a Petition for Reargument nor is Respondent able to locate any authority for such a pleading. If Petitioner could toll the ninety-day period by such subterfuge, the decision of a state court would never become final since filing such a petition is a simple matter.

Now, for the first time, Petitioner raises a federal question in paragraph five (5) of the said Petition for Leave to File a Second Petition for Reargument (Record page 613). Petitioner alleges that rights protected to her by the Fourteenth Amendment to the Constitution of the United States have been violated by the decision of the Supreme Court of Pennsylvania. Respondent submits that the presentation of a federal

question at such time is out of order. This Court has held that even where a federal question is initially raised in an assignment of errors filed in the highest state court, which refused to consider any issue not presented to the trial court, the jurisdiction of the Supreme Court of the United States cannot attach. See: *Bailey vs. Anderson,* 326 U.S. 203, 206-7.

Going one step further, this Court has repeatedly held that raising the federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the court actually entertains the petition and expressly decides the question. See: *Radio Station WOW vs. Johnson,* supra, 128; *Herndon vs. State of Georgia,* 295 U.S. 441, 443; *American Surety Co. vs. Baldwin,* 287 U.S. 156; *Forbes vs. State Council,* 216 U.S. 396; *Simmerman vs. Nebraska,* 116 U.S. 54. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied. See: *Consolidated Turnpike Co. vs. Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-4; *Forbes vs. State Council,* supra, 399; *McCorquodale vs. Texas,* 211 U.S. 432, 436-7. There must be language indicating that the federal question was considered and disposed of. In other words, the court must exert its jurisdiction "in such a way that the case could have been brought here had the questions been raised prior to the original disposition". *Radio Station WOW vs. Johnson,* supra, 128.

In the instant cause, the so-called federal question raised by Petitioner was not raised in her Petition for

Reargument. The Court did not entertain the Petition for Leave to File a Second Petition for Reargument nor did it do more than simply state "Petition dismissed. Rehearing denied. Per Curiam: July 20, 1951." (Record, page 598).

It is well settled that, before this Court will review a decision of a state court, it must affirmatively appear from the record that a federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. See: *U.S. ex rel. Herge vs. Commonwealth of Pennsylvania,* 89 F. Supp. 636, 639. In the instant cause, no federal question was ever raised before the State Courts bringing Petitioner within the scope of the above cited authority.

III. The Construction of a Will by State Courts Is Binding upon Federal Courts

The Supreme Court of Pennsylvania had before it for determination one principal question. The Sixth clause of George W. Nevil's Will provided:

> "Sixth: All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any Municipal authority thereof, which taxes are to be paid by my estate."

The question involved was whether or not this clause was broad enough to include within its scope personal

income taxes imposed by the United States Government against the petitioner personally. This was simply a matter of construction and was, of course, to be controlled by certain legal principles used by Pennsylvania Courts in construing Wills, legal principles that have been long and well established in the law of Pennsylvania. For example: It is well settled that the intent of the testator is to be gathered from the whole Will, i. e. from the language within its four corners. See: *Shareff's Estate,* 143 Pa. Super. 465, 17 A. 2nd 623. The question is not what the testator probably intended but only what intention is expressed in the language used. See: *Conner's Estate,* 346 Pa. 271, 29 A. 2nd 514. It is true that we must put ourselves in the testator's place in order to determine what he meant by his Will, but when we have reached that coign of vantage, we must still declare the meaning of the language used, and not some other possible but undisclosed purpose. See: *Yates's Estate,* 281 Pa. 178, 126 A. 254. Interpretation is never to assume the proportion of reformation. See *Jacob's Estate,* 343 Pa. 387, 22 A. 2nd 744. And while extrinsic evidence may be admitted to aid or explain that which appears on the face of the Will, such evidence must always relate to that which is embodied in the Will. The controlling principle regarding the admission of such testimony is that it cannot be received as evidence of the testator's intention outside of and independent of the written words employed. See *Reinheimer's Estate,* 265 Pa. 185, 189, 108 A. 412, 413.

It was in the light of these principles that the Supreme Court of Pennsylvania concluded that "dece-

dent's Will does not thus specifically provide that the estate should pay the taxes *on the income* received by appellant from the trust and which she would otherwise be obliged to pay." (Record, page 602).

Our federal courts have long recognized that local law determines the right to make a testamentary disposition of property and the conditions essential to the validity of Wills and that it is the province of state courts to settle the construction of Wills. See *Lyeth vs. Hoey,* 305 U.S. 188, 193. The judicial construction of a Will by the State Court determines not only legally but practically the extent and character of the interests taken by the legatees *and is binding on the federal court.* See: *Sharpe vs. Commissioner of Internal Revenue,* supra, 14, and cases cited therein.

Respondent therefore submits that the construction placed upon the decedent's Will in the instant cause is not reviewable by this Court.

IV. There Has Been no Denial of Due Process to the Petitioner

As the record clearly discloses, this is the first time in these proceedings that the Petitioner has alleged a contract between the decedent and the Petitioner. Petitioner cites Record Vol. 1, page 1402 as the place where she attempted to prove this alleged contract. Reference to that page discloses that this alleged contract, if it may even be termed that, must have been an alleged contract for services of some sort. Yet Pe-

titioner's counsel, Mr. Schofield, states to the lower court on the subsequent page that it was "Not a claim for services." (Record Vol. 1, page 1412).

Needless to say, no exceptions were ever filed to indicate that Petitioner was dissatisfied with the court's ruling. Petitioner's attempt to raise such a question at this stage of the proceedings is obviously and patently a belated attempt to grasp at any straw in order to reopen a case, the adjudication of which is beyond appeal and final in every sense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOV 3 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 348.

October Term, 1951.

MARY K. ELLIS,
Petitioner and Appellant Below,

v.

GIRARD TRUST COMPANY, Surviving Trustee Under the Will of GEORGE W. NEVIL, Deceased,
Respondent and Appellee Below.

Petitioner's Reply Brief.

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TABLE OF CITATIONS.

	Page
Bosley v. Wyatt, 14 How. 390, 14 L. Ed. 468	3
Colton v. Colton, 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 138	3
Dandridge v. Washington, 2 Pet. 370; 7 L. Ed. 454	3
Giles v. Little, 104 U. S. 291, 26 L. Ed. 745	3
Kenaday v. Sinnolt, 179 U. S. 606, 21 S. Ct. 223, 45 L. Ed. 339	3
Shriver v. Lynn, 2 How. 43, 11 L. Ed. 172	3
Stern and Eugene Cressman on "Supreme Court Practice," Page 71	2
Williamson's Estate, 61 Montgomery L. R. 242	5

Supreme Court of the United States.

No. 348.

October Term, 1951.

MARY K. ELLIS,

Petitioner,

v.

GIRARD TRUST COMPANY, Surviving Trustee Under the Will of GEORGE W. NEVIL, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

1. The Petitioner denies that the petition for writ of certiorari is out of time.

The record clearly shows that the Petition for certiorari was filed in time. The last action of the Supreme Court of Pennsylvania took place on July 20, 1951. The petition for certiorari was filed on September 22, 1951. Until the Supreme Court of Pennsylvania acted on July 20, 1951, the petitioner was unable to file her petition for certiorari as the record was not complete until that time.

The Supreme Court of Pennsylvania could not have certified a full and complete record to this Court, because a petition for rehearing was pending before the Supreme Court of Pennsylvania until July 20, 1951. Petitioner thereafter acted promptly, having filed the present petition on September 22, 1951.

2. It is further averred that the federal question now before this Court was fully before the Supreme Court of

Pennsylvania and fully considered by it, because the petition for rehearing was before the Supreme Court of Pennsylvania for 28 days—to wit: June 22, 1951 to July 20, 1951. (Pp. 613 and 614 of the record specifically and all through the record generally.)

See Stern and Eugene Cressman on "Supreme Court Practice," Page 71, and cases therein cited.

At the time of the printing of the record, counsel for petitioner requested the Prothonotary of the Supreme Court of Pennsylvania to attach to the record a Certificate to the effect that the federal question had been raised and decided. He was advised that a separate Certificate was not necessary as the certified record clearly showed this was fully considered and acted upon by the Pennsylvania Supreme Court before dismissing the petition. *He has again called upon the Prothonotary of the Supreme Court of Pennsylvania and has been again advised that a certificate is unnecessary as the record certified to Your Honorable Court is the full record and clearly shows that the said Court considered and acted upon the Federal question when it dismissed the prayer of the petition.*

3. It is denied that the construction of a Will by State Courts is *in all* cases binding upon Federal Courts. It may be *in some cases but not in others.* Where the construction placed upon certain phraseology results in preventing a testator from making a Will as he wishes, there being nothing illegal about his wishes, or the action of the State Courts violates the 14th Amendment by denying the parties the right to contract or taking from one his property without due compensation, or otherwise denies him due process, there as well as in many other cases your Honorable Court should and does have jurisdiction.

There are lots of cases in which your Honorable Court has assumed jurisdiction in the matter of Wills: The following are some of them:

The Supreme Court of the United States said in the case of *Colton v. Colton,* 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 1381:

> "the construction of a Will is governed by the intention of the testator, when not inconsistent with the rules of law."

See also *Kenaday v. Sinnolt,* 179 U. S. 606, 21 S. Ct. 233, 45 L. Ed. 339, *Bosley v. Wyatt,* 14 How. 390, 14 L. Ed. 468, and *Shriver v. Lynn,* 2 How. 43, 11 L. Ed. 172.

The intention of the testator must prevail in giving a construction to a Will; his expressed intention constitutes the law unless it conflicts with some established legal principle.

The intention of a testator is to be collected from the Will and from the circumstances under which it was made.

> *Dandridge v. Washington,* 2 Pet. 370; 7 L. Ed. 454.

In *Giles v. Little,* 104 U. S. 291, 26 L. Ed. 745, this Court said:

> "In ascertaining the intention of the testator, a Will should be construed in the light of the circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the Will itself."

In *Colton v. Colton,* 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 138, it said:

> "The judicial interpretation of a Will aims at understanding the testator's intention according to the meaning of the words he has used deduced by considering the whole instrument and comparing its several parts in the light of the situation and circumstances which surrounded the testator when the Will was framed."

Thus, you will see it clearly depends upon the case as to whether the Supreme Court has jurisdiction.

Here the record shows the testator's plan, and that to carry out the plan it was necessary that the monthly gift to appellant should not be diminished. To accomplish this he used the broadest language possible, to wit: that

> "all the bequests, legacies and devises herein contained are to be free from any and *all* taxes lawfully *imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof,* which taxes are to be paid by my estate."

What was her bequest? $7,000 a month, of course.

And that was to be "free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any Municipal Authority thereof, which taxes are to be paid by my Estate." How could he say more clearly what he wished?

There can only be one conclusion that the Estate should pay *all* taxes that might in any way reduce the $7,000 a month which he figured was necessary to carry out his wishes. To hold otherwise was to deny him the right to make his Will as he wished and deprive her of her property without due process—all contrary to the 14th Amendment to the Constitution of the United States.

The answer of the Respondent, Girard Trust Company, Trustee, comes with poor grace, in this case, as it was the corporate fiduciary in the matter of Williamson's Estate cited in petitioner's brief, (a full copy of the opinion in which was submitted to your Honorable Court). *Substantially the same language appeared in our Will.* No appeal was taken by this fiduciary in the Williamson matter, but on the contrary it is paying out of the estate the income tax caused by reason of the monthly payments directed by the Will to be paid to that decedent's Widow. How the said fiduciary can reconcile its conduct in that case with its attitude in this case is more than we can tell. To say its position in the two cases was inconsistent is mild to say the least.

In view of the fact that a federal question is involved, the Respondent should welcome a decision by your Honorable Court in the above matter so that the question can be finally and fairly decided by the highest Court.

4. The Supreme Court has but to read the record to see that the testator had carefully planned the distribution of his estate. He took into consideration the effect *taxes of every kind* might have on it; and that this petitioner agreed to carry out his plan; it was his money and his estate and he had the right to do with it as he wished, provided he remained within the law. To deny the testator and the petitioner the right to carry out testator's wish and their agreement surely violated the 14th Amendment. To cause any tax on the $7,000 a month to be paid out of her money so received constituted a taking of her property and also violated the said Amendment, which this Court should not tolerate.

In this case, had the Trustee continued the investments in non-taxables, this question would not have arisen. It shifted the taxes to taxables, which caused this tax. *By doing so it increased the income, and almost $1,000,000 of income has accumulated in the hands of Respondent for a charity in the future. This at the expense of your petitioner. It furthermore was contrary to his will. Testator never intended petitioner, the first object of his bounty, as clearly appears by the will, to be penalized for the benefit of the future charity, which the record shows he named because he did not know what to do with his estate after petitioner died.*

The Court's attention is called to the fact that in this present case there was a divided Court, and the opinion of the minority clearly states what is right and fair, and is and should be the law of the land. While the Supreme Court of Pennsylvania did not have before it the opinion of Judge Holland (a very able Judge) in *Williamson's Estate*, 61 Montgomery L. R. 242, the opinion in that case shows Judge Holland's thought along the same lines as the minority in this case.

The Court's attention is particularly called to the fact that the record in this case shows that the Court below decided the matter first one way and then another, showing he himself was in doubt.

This case has attracted widespread attention and is an important one from every standpoint. A report of it has appeared in many law journals, tax magazines and daily papers all over the country, showing the decision is of National interest and importance.

A will is to be construed in its entirety. Every word and phrase is to be considered and given effect in the construction of a will. That is a basic and fundamental principle supported by numerous cases.

In the present case, if the testator had said nothing in his will as to taxes, or who was to pay them, the basic principles of construction and the federal revenue laws would have placed the tax burden upon your petitioner.

The decision of the Supreme Court of Pennsylvania has put the tax burden on your petitioner. The effect of that decision is to ignore the language used by the testator as to who was to pay the taxes, contrary to the aforesaid basic principle of law. Thus the Court's decision has placed an illegal and improper tax burden on your petitioner, causing her property to be taken from her without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

It is submitted that the questions raised are national questions, and the petition for certiorari should be granted and the question finally decided once and for all after full argument.

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FILED
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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 348.

October Term, 1951.

MARY K. ELLIS,
Petitioner and Appellant Below,

v.

GIRARD TRUST COMPANY, Surviving Trustee Under the Will of GEORGE W. NEVIL, Deceased,
Respondent and Appellee Below.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States.

No. 348. OCTOBER TERM, 1951.

MARY K. ELLIS,
Petitioner and Appellant Below.

v.

GIRARD TRUST COMPANY, SURVIVING TRUSTEE UNDER THE WILL OF GEORGE W. NEVIL, DECEASED,
Respondent and Appellee Below.

PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary K. Ellis, prays that this Court re-hear and reconsider its denial of the petitioner's petition for issuance of a writ of certiorari to review the decision of the Supreme Court of Pennsylvania in the above entitled case.

On September 22, 1951, your Petitioner filed with your Honorable Court a petition for writ of certiorari to the Supreme Court of Pennsylvania in the above matter. The Respondent subsequently filed its reply with your Honorable Court and copies of the same were served on Petitioner's counsel on October 25, 1951. Your Petitioner filed with your Honorable Court her reply brief on Saturday, *November 3, 1951.* On Monday, November 5, 1951, *two days later* (Sunday having intervened), your Petitioner's counsel received a telegram advising him that Petitioner's petition had been denied.

The history of the case, the questions presented, the law involved, the specifications of error and the reasons for granting the writ are all set forth in the Petition for Certiorari, the brief in support thereof and your Petitioner's reply to the Respondent's brief, to which reference is made, and will not be repeated here.

GROUNDS FOR GRANTING THE PETITION.

Your Petitioner feels that a serious error has been made by your Honorable Court in refusing certiorari, and submits that the Supreme Court of Pennsylvania has decided an important federal question of substance in conflict with the Fourteenth Amendment to the Constitution of the United States and applicable decisions of the Supreme Court of the United States.

Your Petitioner feels that she set forth in her reply to the Respondent's brief important matters, and there was a possibility that the time elapsed between her filing the reply brief and the action of your Honorable Court was so short that proper consideration was not given to the material therein contained.

She therefore feels that for this reason as well as other reasons hereinafter set forth she should file this petition for rehearing.

George W. Nevil, the decedent here, was this Petitioner's foster father. He was a bachelor and had lived with his sister and several brothers, all of whom predeceased him. They had raised this Petitioner from her childhood. The decedent was the last living member of his family, and he left no other near relatives. In making his will, the record shows your Petitioner was the first object of his bounty. He had set up for himself and your Petitioner, his ward, a certain scale of living, and he wished her to continue to so live after his death, and the record shows he made her promise so to do. He calculated what it was costing him to live as he did, and by his will he attempted

to provide for monthly payments to permit her to so live. In order that there might be no doubt as to her ability so to do, he provided that her gift of so much a month should be "free and clear of *all taxes* imposed or to be imposed by the United States, any state, or any municipality." At the time he died his estate was almost entirely invested in municipal bonds, the income from which was not subject to income taxes.

The Trustee under the will, however, on receiving the estate, shifted it from municipal or non-taxables into taxables. The result was that, while the income from the estate was much higher, the gift to your Petitioner of so much per month was, by reason of the income tax caused by the shift, greatly depleted—to such an extent that she has been unable to keep her promise with the decedent and live in the way she had so promised him. The estate's income by the shift in the securities was greatly increased. Your Petitioner, the chief object of decedent's bounty, however, did not benefit by this, but on the contrary her payments were depleted by the income tax caused thereby, although almost a million dollars excess income has accumulated to date for the benefit of the unformed charity. As stated, the record clearly shows that your decedent was the chief object of decedent's bounty and the provision for the unformed charity was only inserted because he did not know what to do with the fund after your Petitioner's death. Your Petitioner contends that the switch in the type of investments resulting in a great increase in her income taxes, constituted taking from her, without her consent, and contrary to the testator's direction, a large part of the income he intended for her. The result has been to accumulate a large fund for the unformed charity which was not the chief object of testator's bounty. She also contends that by approving that course of action the Pennsylvania Courts have denied to the testator the right to make a will as he wished, even though there was nothing unlawful in what he desired,

and furthermore the Courts have attempted to make his will for him.

True it is that ordinarily a State has charge of and jurisdiction over the distribution of estates therein and of the interpretation of wills relating to estates therein, but the Petitioner contends in so doing the State must not violate the Fourteenth Amendment to the Constitution of the United States and deny anyone interested due process. If it does, the matter becomes a federal one and the person so injured has the right of appeal to your Honorable Court.

See Michigan Law Review for November, 1951, Page 35, and the cases therein cited.

That is what the Pennsylvania Courts did here.

In the case at Bar the tax clause is very clear. The testator says just what he means, to wit, that his estate should pay all taxes imposed or to be imposed by the United States, or any State, or any municipality that affected the monthly payments to be received by your Petitioner, his ward, and the chief object of his bounty. He knew from personal experience that to live as he had lived—and the manner in which he had made her promise to live—it required the monthly amount he provided in his will she should receive. In order that she might be sure of the sum, he even provided that the fund from which the petitioner was to draw her income was not to become a part of his general residuary estate until her death. After her death he provided it should fall into the residuary fund and the income therefrom was to provide for the Home then to be formed. As heretofore stated, he had all his funds invested in municipal bonds, the income from which he knew was not subject to income tax. He never intended that the fund should be transferred to taxable securities by the trustees and cause the income from the reinvestments to become subject to such a tax that would deprive her of the benefit of the full monthly sum. He especially did not wish this and he tried in every way by his will to make it clear that she was the first object of his bounty

and should have the full sum. He certainly never intended that she should be penalized to the benefit of or the enrichment of the fund which would accumulate for the charities.

This case is so much like the case in "Williamson's Estate" (a printed copy of which was filed with the petition) in which the same trustee, Girard Trust Company, was also trustee, that your Petitioner cannot refrain from quoting from Judge Holland's opinion, on page 4 of the printed opinion filed with the Petition for Certiorari, to wit:

> *"We can only consider the exact meaning of the words used and they are so all-inclusive as to make it impossible to come to any conclusion but that any possible tax that would be a charge or encumbrance on the income is payable out of the residuary estate of the decedent. The testator employs every possible word available in the language and with the choice of the strongest to indicate his intentions. * * * Furthermore, when we consider that this annuity constitutes income and that the primary and essential tax on income is an income tax, it seems convincing that he intended tax on this sum to be paid out of the residue and we so hold."*

Our case is even stronger, because to pay the tax the trustee would not necessarily be depleting principal but the same would be paid out of the excess income of the estate caused by the shift in investments.

The Supreme Court of Pennsylvania raised a question as to the practicability of working out the amount of the tax. Your Honorable Court's attention is called to the suggestion of Judge Holland in said opinion showing in Williamson's Estate, *supra,* that it was not impracticable.

Petitioner contends she is being deprived of her property without due process of law by the effect of the decision of the Supreme Court of Pennsylvania which has put the tax burden on the Petitioner in spite of the tax clause in the will.

Where a will makes no provision as to taxes, the taxes have to be paid by the respective beneficiaries. The testator was aware of this. Hence he provided in his will that the estate was *to pay all taxes. The decision of the Supreme Court of Pennsylvania in effect completely ignores this part of the will. That action by the Supreme Court of Pennsylvania is contrary to the basic principle governing the construction of wills that every word in a will is to be considered. This the majority of the Supreme Court of Pennsylvania has failed to do, thereby causing Petitioner's property to be improperly taken from her.*

CONCLUSION.

Your Petitioner submits that the action of the Pennsylvania Court denies testator the right to make a will and without her consent arbitrarily takes from your Petitioner her property and gives it to another without due compensation, and therefore its decision, for this reason, as well as the other reasons set forth in the petition, violates the Fourteenth Amendment to the Constitution of the United States, and her petition for certiorari should be granted.

The undersigned counsel of record for the Petitioner certifies that this petition is presented in good faith and not for delay.

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